

STATE OF ALASKA

DEPARTMENT OF

FISH AND GAME *Habitat and Restoration Division*

TONY

KNOWLES, GOVERNOR P.O. BOX 25526 JUNEAU, AK 99802-5526 PHONE: (907) 465-4105 FAX: (907) 465-4759

MEMORANDUM

TO: Randy Bates
Statewide Planning Division
Alaska Department of Transportation & Public Facilities

FROM: Janet Hall Schempf
ACMP Coordinator

DATE: February 28, 2001

SUBJECT: ADF&G comments, 6 AAC 50. Alaska Coastal Management Program Implementation

The Alaska Department of Fish and Game has reviewed the proposed revisions to the 6 AAC 50 consistency review regulations. We appreciate the work that you and others have done to prepare this package for public review and comment. The Department believes these proposed regulations greatly improve the procedural regulations for reviewing projects affecting the state's coastal resources.

We offer the following recommendations for additional refinement of the proposed language. Our intent is to better facilitate state resource agency permitting, as well as timeliness of project reviews.

ARTICLE 1. PROGRAM ADMINISTRATION

6 AAC 50.005. APPLICABILITY OF THE ACMP CONSISTENCY REVIEW PROCESS:

The Department believes applicability of the ACMP consistency review should be broad. 6

AAC 50.005 (a) (1) through (4) clearly state that the ACMP consistency review process is linked to permitting by state and federal agencies. We recommend this language be retained.

6 AAC 50.005 (b) and (c) concern the procedures of a consistency review process: one procedure for projects requiring only state authorizations; a second for federal activities in the coastal zone; and a third for projects requiring a federal authorization. The second and third categories of projects sometimes require state authorizations, though the requirement to submit state authorization applications is found only briefly, at 50.325 (c)(6) and 50.425(c)(5), and may be easily overlooked. We recommend additional formatting to better highlight these “subcategories” of federal activities and federally regulated activities.

6 AAC 50.025. SCOPE OF PROJECT SUBJECT TO CONSISTENCY REVIEW: Whenever possible, District participation should be encouraged, especially for those Districts having their own approval to issue for the project under review. To this end, we recommend revising (a) to include consultation with Districts about the scope of the project review:

- (a) The coordinating agency, in consultation with Coastal Resource Districts and any resource agency that requires an authorization, shall determine the scope of the project subject to a consistency review.

6 AAC 50.055. COASTAL RESOURCE DISTRICT RESPONSIBILITY: We encourage strengthening the relationship between a state consistency finding and a District approval for the same project. 6 AAC 50.055 (b)(2) is a cumbersome way to say that consistency requirements may be included in local approvals for the project. We recommend revising and reordering (a), (b), and (c) as follows:

- (a) ~~(b), (b)(1)~~ A coastal resource district whose program is incorporated into the ACMP is considered to have expertise in the interpretation and application of its program;
- (b) ~~(a)~~ Any coastal resource district may participate in a consistency review under this chapter by submitting comments to the coordinating agency regarding consistency of the proposed project with the enforceable policies of the ACMP; and
- (c) ~~(b)(2) may include an alternative measure identified in a final consistency determination issued under 6 AAC 50.265 in an authorization for the project that is issued under the coastal resource district’s Title 29 authority. Alternative measures identified in the final consistency determination issued for a project under 6 AAC 50.265 may be included in local permits and approvals issued by a coastal district having Title 29 authority.~~

ARTICLE 2. STATE CONSISTENCY REVIEW PROCESS

We recommend that all terms used in this article be carefully explained. Phrases such as “categorically consistent,” “general consistency,” and “general concurrence” represent important

concepts that should be well understood by applicants and review participants.

6 AAC 50.220. APPLICANT CONSISTENCY REVIEW PACKET: In addition to the information requirements listed in this section, the Coastal Project Questionnaire, agency authorization applications, and supporting materials should be signed and dated.

6 AAC 50.225. DETERMINATION OF COMPLETENESS AND NOTICE TO APPLICANT: We recommend (b)(3) be revised to include consultation with state resource agencies and any affected coastal district:

(3) in consultation with the affected coastal resource district and resource agencies that require an authorization, the coordinating agency determines the packet is sufficient for continued processing even though additional information may be required subsequently.

6 AAC 50.235. TIMING OF A CONSISTENCY REVIEW: We recommend combining review milestones and deadlines when the process benefits. In this case, we recommend that the last day to request conversion of a 30-day review to a 50-day review be the same review day as the last day to request additional information.

6 AAC 50.240. INITIATION OF A CONSISTENCY REVIEW: The opportunity to begin a project review with a complete review packet is welcomed. We believe that a coordinated start date and a carefully prepared suite of applications will yield smoother project reviews for the applicant as well as the review participants. We understand this coordinated start date applies only to projects requiring state permits.

6 AAC 50.245. REQUEST FOR ADDITIONAL INFORMATION: We are pleased that the provision to request additional information is included in these proposed revisions to the project consistency regulations. However, we are concerned that the last day to request information would be changed from Day 15 of a 30-day review to Day 13. Project reviewers coordinate project reviews with research and management staff throughout the department; this coordination process cannot be hurried without a related reduction in thoroughness and quality.

6 AAC 50.250. COMMENT DEADLINES: The proposed regulations would reduce the public/agency review period from the current 34 days to 30 days. Our permitting staff is concerned that any reduction of available review time will diminish the quality of our consistency recommendations and review comments, and increase the possibility of otherwise avoidable resource damage. Further, the number of projects we are able to review is also likely to be reduced.

6 AAC 50.280. CONSISTENCY REVIEW SCHEDULE MODIFICATION AND TERMINATION: ADF&G appreciates the language of 6 AAC 50.280. (a), which would allow agencies to mesh project review periods that are established via other state regulations with the consistency review process. For example, our process for reviewing and approving fish hatchery proposals includes milestones for consistency. These milestones don't match the deadlines set

forth elsewhere in proposed Article 2, but proposed 6 AAC 50.280 provides the flexibility we need for the hatchery review process.

ARTICLE 3. CONSISTENCY REVIEW PROCESS FOR FEDERAL ACTIVITIES

6 AAC 50.355. COMMENT DEADLINE AND REVIEW SCHEDULE MODIFICATION OR EXTENSION: The proposed regulations would reduce the public/agency review period from the current 34 days to 30 days. As we noted concerning 6 AAC 50.250, we are concerned that any reduction of available review time will diminish our participation in the consistency review process.

ARTICLE 4. CONSISTENCY REVIEW PROCESS FOR FEDERALLY REGULATED ACTIVITIES

6 AAC 50.455. COMMENT DEADLINES AND REVIEW SCHEDULE MODIFICATIONS AND EXTENSIONS: The proposed regulations would reduce the public/agency review period from the current 34 days to 30 days. As we noted concerning 6 AAC 50.250 and 6 AAC 50.355, we are concerned that shortened review times may result in less thorough, less complete reviews. Further, we are concerned that the number of projects we are able to review could be reduced as a result of the shorter review period

ARTICLE 6. ELEVATION AND PETITION

6 AAC 50.600. TIMING OF AN ELEVATION AND PETITION ON A PROPOSED CONSISTENCY DETERMINATION OR RESPONSE.

Article 6 would limit elevations to ACMP-only concerns. The proposed 6 AAC 50.275.(b) Resource Agency Project Authorization is clear that an alternative measure (consistency recommendation) that is within a resource agency's area of expertise shall be implemented through the agency's authorization for the project; that an alternative measure (consistency recommendation) not clearly within any agency's jurisdiction or expertise shall be implemented through *all* resource agency authorizations required for a project; and that any condition (permit stipulation) necessary to ensure compliance with an agency's statutory or regulatory authority that is also necessary to ensure the project is consistent with the ACMP shall be included on the agency's authorization for the project.

The proposed 6 AAC 50.610 (b), Elevation Process, further differentiates "alternative measures" and "conditions," and limits an elevation to consideration of only those alternative measures identified as necessary solely to ensure consistency with the ACMP.

While we see advantages to separating requirements directly related to an agency authority from the consistency discussion, we also see substantial disadvantages. For example, many Alaska

waterways support anadromous fish, but only a portion of these waterways are included in the current *Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes*, and thus are not afforded protection via AS 16.05.870, the Anadromous Fish Act. Other land management tools are used to protect salmon habitat that is known, but not yet included in the *Catalog*. Of these tools, one of the most important is Coastal Management. We are concerned that a rigid separation of “alternative measures” and “conditions” will result in less protection of fish habitats.

ARTICLE 7. GENERAL AND NATIONWIDE PERMITS, CATEGORICALLY CONSISTENT DETERMINATIONS, GENERAL CONSISTENCY DETERMINATIONS, AND GENERAL CONSISTENCY CONCURRENCES

Most of Article 7 is about state authorizations, rather than federal permits such as COE Nationwide or COE and EPA General Permits. For clarity, we recommend separating the regulations concerning federal permits from those specific to state permits. Further, we recommend all jargon be carefully explained in a preamble and the Article 9 definitions.

6 AAC 50.700. USE OF GENERAL AND NATIONWIDE PERMITS, CATEGORICALLY CONSISTENT DETERMINATIONS, GENERAL CONSISTENCY DETERMINATIONS, AND GENERAL CONCURRENCES IN PROJECT CONSISTENCY REVIEWS: 6 AAC 50.700 (a) states that activities authorized by a general or nationwide permit are consistent based on implementation of the general or nationwide permit. This can be understood to mean that these activities may proceed without further consistency review (though a separate agency review may be necessary for agency permitting). Proposed 6 AAC 50.700 (b) poses some question to the interpretation of 6 AAC 50.700 (a), in that if “a project includes both an activity that requires an individual consistency review and an activity that is subject to a categorical or general consistency determination or general concurrence . . . , all activities shall be included in the scope of a project subject to review . . .”. Whenever possible, we recommend the wider review of (b), since most project components of concern are inextricably linked.

6 AAC 50.740. IMPLEMENTATION OF GENERAL CONSISTENCY DETERMINATIONS FOR ACTIVITIES THAT REQUIRE A RESOURCE AGENCY AUTHORIZATION: As proposed, 6 AAC 50.740 would require agencies to include all standard measures in a specific project authorization. In practice, ADF&G typically includes only those stipulations contained in a general concurrence that are directly applicable to our permit and to the proposed project. We do not wish to carry all standard measures identified for an activity on our permits for several reasons, including: these measures would be redundant with other agency authorizations for the same projects; some measures are beyond our authority; some measures are not relevant to the specific project proposals; and the repetitive use of these standard measures may unnecessarily provide the appearance of excessive regulation of permittees by state resource agency.

We prefer to use only those standard measures that apply to our permit and to the proposed project. We recommend (d) be revised to add the word “applicable” as follows:

- (d) An authorization issued for an activity that is consistent based on a general consistency determination must include the applicable standard measures identified in the determination as necessary to ensure the activity is consistent with the ACMP.

6 AAC 50.760. REVIEW PROCESS FOR RESOURCE AGENCY GENERAL PERMITS:

This section establishes a review process for amendments to or new resource agency general permits; the proposed regulation doesn't separate General Permits for B list activities from C list activities. ADF&G's ephemeral General Permits are for activities on the B list; these activities have already undergone a consistency review, and should not be required to undergo an additional consistency review.

ARTICLE 8. PROJECT MODIFICATIONS AND RENEWALS OF AUTHORIZATIONS

Sometimes the effects of an approved project are greater than expected, and the regulations shouldn't eliminate opportunities to correct bad situations. The time of an authorization renewal is a reasonable point in the life of a project to correct situations that may not meet ACMP policies. We recommend the Article be revised to allow redress as necessary.

6 AAC 50.830. AUTHORIZATION EXPIRATION: ADF&G generally issues Fish Habitat and Special Area Permits with expiration dates that allow the activity or use to occur over a specific time period (less than one year), or for the duration of a continuing use. For a variety of reasons, applicants/permittees frequently fail to complete, or even start, their work within the time period authorized by the permit. Our practice has been to reissue the permit upon application if the activity or use had previously undergone an appropriate consistency review, and neither the scope of the project nor affected District Plan(s) have changed. A requirement for a new consistency review based solely on expiration of a permit does not seem justified.

ARTICLE 9. GENERAL PROVISIONS

6 AAC 50.990. DEFINITIONS: As noted earlier, we recommend a "Preamble" to better explain the jargon used in these regulations. For example, words and phrases such as "categorically consistent determinations," "general consistency determinations," and "general consistency concurrences" represent important concepts in the consistency process, but the meaning of the specific terms isn't provided in the current review package. We recommend all jargon be avoided, or if it is used, it should be precisely explained. Further, for reading ease, references to statutory definition should be footnoted, or otherwise explained, so that the definitions provided in 6 AAC50.990 are complete and understandable without going to a separate reference.

We also recommend a correction to definition (12):

- (12) "condition" means a requirement necessary to ensure an activity meets a resource

agency's statutory or regulatory requirements and which may also ensures consistency with the ACMP;

Thank you for the opportunity to comment. We look forward to working with you and others towards finishing this complicated project.

cc: Ken Taylor, Director
Ellen Fritts, Deputy Director
Lance Trasky/Don McKay
Alvin Ott/Mac McLean
Lana Flanders/Bill Hanson
Fran Roche, ADEC
Janet Burleson Baxter, ADNR
John Gliva, DCED